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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTIN ROY CLARKE,

Defendant and Appellant.

D053450

(Super. Ct. No. SCD202776)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed in part, reversed in part, and remanded for sentence modification.

INTRODUCTION

A jury convicted Justin Roy Clarke of 18 counts of residential burglary (Pen. Code, §§ 459, 460)<sup>1</sup>, 16 counts of burglary (§ 459), two counts of receiving stolen property (§ 496, subd. (a)), one count of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), two counts of unlawful driving or taking a vehicle (Veh.

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise specified.

Code, § 10851), one count of evading an officer with reckless driving (Veh. Code, § 2800.2, subd. (a)), and one count of escaping felony custody without force (Pen. Code, § 4532, subd. (b)). As to 15 of the residential burglary counts, the jury found true allegations that a non-accomplice was present. (§ 667.5, subd. (c)(21).) As to 35 of the counts, the jury also found true allegations Clarke was released on bail at the time of the offense. (§ 12022.1, subd. (b).) In addition, Clarke admitted having two prior vehicle theft convictions (§ 666.5, subd. (c)) and two prior prison convictions (§ 667.5, subd. (b), 668, 1203, subd. (e)). The trial court sentenced Clarke to an aggregate term of 44 years and eight months in prison.

Clarke appeals, arguing there is insufficient evidence to support one of the residential burglary convictions and four of the burglary convictions. The People concede there is insufficient evidence to support one of burglary convictions and we reverse the judgment as to it. We affirm the judgment in all other respects.

## FACTUAL BACKGROUND<sup>2</sup>

### *Count 3 – Burglary of Tavern at the Beach Bar (Second Visit)*

Clarke went to the Tavern at the Beach bar with a woman he referred to as his girlfriend and spent approximately \$800 on drinks and tips (first visit). He paid using a credit card he said belonged to his girlfriend. His girlfriend confirmed the card was hers. When asked for her identification, the woman said, "It's over there." She then said, "It's no problem. My parents are loaded." Clarke also said, "Her parents are loaded." The

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<sup>2</sup> We summarize only the facts related to the issues raised in this appeal.

bartender accepted these representations. At the time, the bar did not require bartenders to check a patron's identification when the patron paid with a credit card unless the patron opened a tab and Clarke had not opened a tab that night. A few days later, the bartender learned the credit card company denied the charges because the credit card was stolen.

Approximately a month later, Clarke returned to the bar with a different woman (second visit). The bartender recognized Clarke from the first visit and called the police department. Clarke bought a couple of rounds of drinks during the second visit; however, the bartender did not recall how Clarke paid for the drinks.

Clarke told one of the responding police officers he had purchased the drinks with cash and did not have any credit cards with him. The officer asked him if he had his wallet with him. Clarke produced his wallet as well as a MasterCard with his name on it. The officer asked him if he had any other credit cards and he produced another one. The officer asked again if he had any other credit cards and he said he did not. At that point, Clarke dropped his wallet and after picking it up, he told the officer he also had an American Express card. The officer asked to see the card. Clarke became very nervous, hesitated briefly, and then handed the card to the officer.

The credit card bore the names Jill Epstein and Tazz Lighting and there was a woman's photograph on the back of it. Clarke told the officer the card belonged to his mother who owned Tazz Lighting. The officer asked Clarke for his mother's name, but Clarke would not answer the question.

Epstein, whose husband owns Tazz Lighting, discovered the card was missing from her wallet after American Express informed her of its unauthorized use. The card

had been used to purchase items at a Ralph's store in San Diego 12 days before Clarke's second visit to the bar. Epstein had never shopped at this store, she did not know Clarke, and she had not given him permission to use the card.

*Counts 10 and 11 – Burglary of El Cajon Ralph's Store and McKee's Tavern*

Roxanna Mashoon left the house she shared with her husband Mostafa Golchin for an hour to run an errand. She did not lock the house before she left. When she returned, she discovered her recently purchased flat screen television was missing. In addition, she noticed tire tracks on her freshly resurfaced garage floor that had not been there when she left. Two to three hours later, a credit card company called and informed her unauthorized charges were being made on one of her credit cards. She checked the file cabinet where she kept it and discovered her and her husband's credit cards were missing.

A short time after the burglary, \$247.80 was charged to one of Mashoon's stolen credit cards at a Target store in Poway, \$107.73 was charged to one of Mashoon's stolen credit cards at a Target store in Mira Mesa, and an attempt was made to use one of Golchin's stolen credit cards at a Ralph's store in El Cajon, but the transaction was declined. In addition, one of Golchin's stolen credit cards was used to obtain a cash advance of \$202.25 from an ATM machine at McKee's Tavern. Videotapes showed Clarke made the transactions at the Target stores. Neither Mashoon nor Golchin know Clarke and neither gave anyone permission to use their credit cards.

*Counts 12 and 13 – Residential Burglary of Grommos' Home (First) and Burglary of Poway Target Store*

April Grommo stopped at a Starbucks on her way to work and noticed two credit cards were missing from her wallet. She later received a call from her bank notifying her of a suspicious transaction at a Target store. The prior evening before going to bed she left her purse on the kitchen counter a few feet away from a partially open sliding glass door. A pole held the sliding glass door opening in place. Although there were many other accessible valuables in the house, neither she nor her husband noticed anything else missing.<sup>3</sup> She could not determine how the burglar entered her home, but thought a person may have been able to get through the opening in the sliding glass door.

The same morning Grommo noticed her credit cards were missing, they were used at Target stores in Poway, in Mira Mesa, and in Kearny Mesa. The three transactions occurred within a one-hour period. A gift card purchased with one of the credit cards at the Poway Target store was used later in the day at a Target store in College Grove. Videotapes showed Clarke made the transactions at the Mira Mesa, Kearny Mesa, and College Grove stores. Neither Grommo nor her husband knows Clarke and Grommo did not give Clarke permission to use her credit cards.

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<sup>3</sup> A few weeks later, other valuables and replacement credit cards were stolen during a second burglary of the Grommos' home. The jury convicted Clarke of the second burglary and he is not challenging this conviction on appeal.

Clarke stole credit cards during two other residential burglaries not being challenged in this appeal. Shortly after stealing them, Clarke used the credit cards to make purchases at Target and Ralph's stores.

## DISCUSSION

### A. *Sufficient Evidence Clarke Burglarized the Tavern at the Beach Bar*

Clarke contends there is insufficient evidence to support his conviction for burglarizing the Tavern at the Beach bar during his second visit because there is no evidence he used or intended to use Jill Epstein's credit card or any other credit card during this visit. Preliminarily, we question whether this contention may be raised on appeal because the record shows defense counsel, for tactical reasons, conceded the sufficiency of the evidence to support this conviction in his closing arguments and in response to a jury question.<sup>4</sup> The record further shows Clarke knew of and consented to, or least acquiesced in, defense counsel's tactics.

Assuming this contention is properly raised on appeal, we conclude there is no merit to it. " 'To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] 'Where, as here, the jury's findings rest to some degree upon circumstantial evidence, we must decide whether the circumstances reasonably justify

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<sup>4</sup> The parties did not note or discuss the import of defense counsel's concession in their briefs.

those findings, "but our opinion that the circumstances also might reasonably be reconciled with a contrary finding" does not render the evidence insubstantial.' " (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.)

A burglary occurs when a person enters a specified structure with the intent to commit theft or a felony. (§ 459; *People v. Tafoya, supra*, 42 Cal.4th at p. 170.) Because there is rarely direct proof of the requisite intent, the requisite intent can be inferred from the facts and circumstances disclosed by the evidence. (*People v. Matson* (1974) 13 Cal.3d 35, 41; *In re Matthew A.* (2008) 165 Cal.App.4th 537, 541.) Where the facts and circumstances reasonably indicate a defendant's purpose in entering the premises is to commit theft or a felony, the conviction will not be disturbed on appeal. (*People v. Matson, supra*, at p. 41; *People v. Nunley* (1985) 168 Cal.App.3d 225, 232.)

In this case, the evidence shows Clarke entered the bar with a female companion and a stolen credit card bearing a woman's name. Approximately a month earlier, he entered the bar with a different female companion and charged approximately \$800 in drinks and tips to a stolen credit card bearing a woman's name. On that occasion, he claimed the card belonged to his female companion and she corroborated his claim.

When questioned by police officers during the second visit, he initially lied about having any credit cards. He subsequently admitted having two credit cards, but he lied about having any others. He then admitted having an American Express card, which bore a woman's name, but he lied about the identity of and his relationship to the cardholder. The card had been stolen from Jill Epstein and 12 days earlier had been used without her permission at a Ralph's store in San Diego.

The jury could reasonably infer from the similarities in Clarke's two visits, the prior unauthorized use of the card, and Clarke's false and inconsistent statements to police officers about the card that he intended to commit a theft or felony when he entered the bar on his second visit. (*People v. Citrino* (1956) 46 Cal.2d 284, 289 [false statement regarding source of stolen property provides corroborating evidence to support burglary conviction]; *Nunley, supra*, 168 Cal.App.3d at p. 232 [prior burglary using similar method of operation provides circumstantial evidence of intent to support conviction for subsequent burglary]; see also *People v. Kittrelle* (1951) 102 Cal.App.2d 149, 158 [false and inconsistent statements show consciousness of guilt and support burglary conviction].) The fact that Clarke may not have actually used or attempted to use Epstein's card on his second visit to the bar does not preclude his conviction because as long as a perpetrator enters the premises with the requisite intent, the perpetrator does not need to commit, or even attempt to commit, the intended theft or felony to be guilty of burglary. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042; *In re Matthew A., supra*, 165 Cal.App.4th at pp. 540-541.)

B. *Sufficient Evidence Clarke Burglarized the Grommos' Home*

Clarke contends there is insufficient evidence to support his conviction for the first burglary of the Grommos' home because there is no evidence their home was actually entered on that occasion. We conclude there is no merit to this contention.

The evidence shows the night before Grommo noticed her credit cards were missing from her purse, she left her purse on the kitchen counter a few feet from a partially open sliding glass door. The next morning Clarke used the stolen cards within a

short span of time to purchase items at various Target stores. A jury could reasonably infer from this evidence Clarke entered Grommo's home the prior evening and took the credit cards from her purse.

The fact no other valuables were taken that evening does not preclude this inference particularly since the evidence shows Clarke returned to the home a few weeks later and took the overlooked valuables as well as Grommo's replacement credit cards. Likewise, the fact Grommo could not determine how Clarke entered her home the first time does not preclude an inference that he did so because Grommo indicated it was possible for someone to have entered through the partially opened sliding glass door. Furthermore, "[u]nder the relevant standard of review, circumstantial evidence is not insufficient simply because it is ' " 'susceptible of two interpretations, one of which suggests guilt and the other innocence.' " ' " (*People v. Rabanales* (2008) 168 Cal.App.4th 494, 510.)

C. *Sufficient Evidence Clarke Burglarized the Poway Target and the El Cajon Ralph's Stores*

Clarke contends there is insufficient evidence to support his conviction for the burglaries of the Poway Target store and the El Cajon Ralph's store because there is no videotape or other evidence showing who used Grommo's credit card at the Poway Target store or who attempted to use Golchin's credit card at the El Cajon Ralph's store. However, the evidence before the jury showed Clarke had a pattern of using stolen credit cards at Target and Ralph's stores. In addition, the transaction at the Poway Target store was the first in a series of four transactions that occurred shortly after Grommo's credit

cards were stolen. The fourth transaction involved the use of a gift card purchased as part of the first transaction at the Poway Target store. Videotapes showed Clarke made the second through fourth transactions. The jury could have reasonably inferred from this evidence Clarke was also the person who made the first transaction at the Poway Target store.

Similarly, the attempted transaction at the El Cajon Ralph's store was the third in a series of transactions that occurred shortly after Mashoon's and Golchin's credit cards were stolen. Videotapes showed Clarke made the first two transactions. The jury could have reasonably inferred from this evidence Clarke was also the person who attempted to make the third transaction at the El Cajon Ralph's store.

D. *Insufficient Evidence Clarke Burglarized McKee's Tavern*

Clarke contends, the People concede, and we agree there is insufficient evidence to support Clarke's conviction for burglarizing McKee's Tavern because there is no evidence showing the location of the ATM used to obtain a cash advance from Golchin's credit card. If the ATM was outside the bar, no burglary occurred as "inserting a stolen ATM card into an ATM machine on the outside of a building is not an 'entry' for purposes of the burglary statute." (*People v. Carrington* (2009) 47 Cal.4th 145, 187, citing *People v. Davis* (1998) 18 Cal.4th 712, 718-722.)

## DISPOSITION

The judgment is reversed as to Count 11 and the matter is remanded to the trial court with directions to modify the sentence in accordance with our disposition. In all other respects, the judgment is affirmed.

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McCONNELL, P. J.

WE CONCUR:

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HUFFMAN, J.

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McDONALD, J.